IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

TRAVIS SHERMAN, Plaintiff, v. LT. C. WAGNER, et al., Defendants.	No. CV-10-6128-HU FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff Travis Sherman, an inmate at Oregon State

Penitentiary (OSP), brings this 42 U.S.C. § 1983 action against several employees of the Oregon Department of Corrections (ODOC), regarding an incident in April 2009 in which plaintiff was tasered when he refused an injection. Defendants move for summary judgment.[1] I recommend that the motion be granted.

BACKGROUND

On April 13, 2009, plaintiff was housed in the Mental Health Infirmary (MHI) at OSP in cell S-24. Compl. at ¶¶ 10, 11. At the time, he was under an involuntary medication order based upon a diagnosis of paranoid schizophrenia. Id. at ¶ 12. He was scheduled to receive an involuntary injection of medication. Id. at ¶ 13.

Defendant C. Wagner, the shift supervisor of the MHI, approached plaintiff at the door of plaintiff's cell, and told him that it was time for plaintiff to take the involuntary injection. Id. at ¶ 14. Plaintiff responded that he did not need the medication and it was making him worse. Id. at ¶ 15. Wagner than gave plaintiff a "direct order" to submit to restraints. Id. at ¶ 16. Plaintiff responded "Fuck you. I ain't taking any medication. If you come in here I am going to smash you out." Id. at ¶ 17.

Wagner then contacted defendant OSP Superintendent Brian Belleque regarding the use of a "Controlled Move Team," which could

[1] A pro se prisoner summary judgment advice order was issued and sent to plaintiff on October 19, 2010, informing him, inter alia, that defendants may choose to file a summary judgment motion and further informing him of the right to respond, the necessity to support the response, and the consequences of failing to respond. Dkt #11. Nonetheless, plaintiff has failed to respond to the motion, even though the motion and its supporting materials were served on plaintiff via mail delivery.

include use of a taser and electronic shield. Id. at ¶¶ 20, 22. Wagner assembled a team composed of several of the named defendants. See Id. at ¶ 26.

The team approached plaintiff's cell and Wagner gave two more orders to plaintiff to submit to restraints or the taser and electronic shield would be used. Id. at ¶ 27. Plaintiff refused. Id. at ¶ 28. Plaintiff first responded "I ain't doing shit." Exh. 1 to Sprague Declr. (DVD showing video of plaintiff's cell extraction). The second time, plaintiff responded "I ain't doing shit, fool." Id. Wagner then warned plaintiff that the team was ready to use the taser and the electronic shield, to which plaintiff responded "Bring it on." Id.

Wagner directed plaintiff's cell door to be opened at which point the team opened plaintiff's cell door, warned plaintiff about the taser, and then tased plaintiff. Id.; Compl. at ¶ 29. Plaintiff was then restrained, and after responding that he could walk, he was escorted to cell S-1 in the MHI where he was injected with the medication and his injuries from the taser projectiles were treated. Id.; Compl. at ¶ 30. Plaintiff alleges that as a result of the tasering, he has experienced nausea, sweats, chills, lack of sleep, and anxiety. Id. at ¶ 33.

STANDARDS

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of "'pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

"If the moving party meets its initial burden of showing 'the absence of a material and triable issue of fact,' 'the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense.'" Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991) (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)). The nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex, 477 U.S. at 322-23.

The substantive law governing a claim determines whether a fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as to the existence of a genuine issue of fact must be resolved against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

If the factual context makes the nonmoving party's claim as to the existence of a material issue of fact implausible, that party must come forward with more persuasive evidence to support his claim than would otherwise be necessary. Id.; In re Agricultural Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

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DISCUSSION

Plaintiff brings claims under the Eighth Amendment, the Fourth Amendment, and the Due Process Clause. The due process claim appears to be one of substantive due process, alleging that defendants' actions violated plaintiff's liberty interest. Compl. at ¶ 36.

The only cognizable claim is the Eighth Amendment claim. The Fourth Amendment and due process claims are merely duplicative of the rights expressly guaranteed under the Eighth Amendment's cruel and unusual punishment prohibition. E.g., Whitley v. Albers, 475 U.S. 312, 327 (1986) ("the Eighth Amendment . . . serves as the primary source of substantive protection to convicted prisoners in cases . . . where the deliberate use of force is challenged as excessive and unjustified" and "in these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause."); Clement v. Gomez, 298 F.3d 898, 903 (9th Cir. 2002) ("When prison officials use excessive force against prisoners, they violate the inmates' Eighth Amendment right to be free from cruel and unusual punishment" and indicating that the Eighth Amendment, not the Fourth Amendment, governs such claims).

Under the Eighth Amendment, "[f]orce does not amount to a constitutional violation . . . if it is applied in a good faith effort to restore discipline and order and not 'maliciously and sadistically for the very purpose of causing harm.'" Id. (quoting Whitley, 475 U.S. at 320-21). Factors relevant to the analysis are: (1) the need for application of force; (2) the relationship between the need and the amount of force used; (3) the extent of

the injury to the plaintiff; (4) the extent of the threat to staff and inmates as reasonably perceived by the responsible officials on the facts known to them, and (5) any effort made to use lesser force. Whitley, 475 U.S. at 320-21.

In the Ninth Circuit, use of tasers to control inmates is not cruel and unusual punishment. Michenfelder v. Sumner, 860 F.2d 328, 336 (9th Cir. 1988). While the appropriateness of the particular use must be gauged by "the facts and circumstances of the case," the use is not per se unconstitutional. Id..

Here, plaintiff admits he refused to comply with a direct order to back up and submit to restraints. He also admits that he threatened the prison staff when he stated he would "smash out" those who tried to restrain him. He indicates that prison officials gave him ample warning about the level of force they planned to use, to which he responded "bring it on." Plaintiff exhibited insubordinate behavior and threatened to be combative. Considering the relevant factors noted above, the decision to apply force was reasonable under the circumstances and was not sadistic or malicious. No reasonable juror could conclude otherwise.

Finally, plaintiff complains that defendants failed to follow OSP policy by using the taser when neither Belleque nor the facility's highest ranking security officer, were physically present. However, failure to follow prison policy does not, by itself, state a section 1983 claim. E.g., Porro v. Barnes, 624 F.3d 1322, 1229 (10th Cir. 2010) ("violation of a prison regulation does not give rise to an Eighth Amendment violation absent evidence the prison official's conduct failed to conform to the constitutional standard.") (internal quotation omitted); see also

Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 371 (9th Cir. 1998) (state law violations do not, on their own, give rise to liability under section 1983); Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 370-71 (9th Cir. 1996) ("Section 1983 limits a federal court's analysis to the deprivation of rights secured by the federal "'Constitution and laws'"; only when the violation of state law causes the deprivation of a right protected by the United States Constitution does that violation form the basis for a Section 1983 action). Thus, given that defendants' actions did not violate plaintiff's Eighth Amendment rights, the fact that they are alleged to have violated prison policy does not rescue plaintiff's claim.

CONCLUSION

I recommend that defendants' motion for summary judgment [12] be granted.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due March 18, 2011. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due June 6, 2011. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

Dated this 28th day of February, 2011

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge